select an off-plant site in which to hold the election and to hand-distribute notices of the election to employees as they reported for work. The Company was notified that the employees would vote only after submitting affidavits as to their eligibility (R. 115-117).

In October 1966, the second election was held and the Union won, 136 to 1 (R. 108-109). The Company filed objections to the election, alleging, in part, that (R. 109-110):

1. An insufficient number of employees voted in the second election to consider the vote a representative sample of all the employees in the unit.
2. The Union engaged in pre-election threats to the employees.
3. Certain ineligible employees voted in the election.
4. The election was held in an unsuitable place, where a union rally had been held the night before the election.

After a full investigation, pursuant to the Board's Rules and Regulations (Section 102.69(c), 29 C.F.R. 102.69(c)), during which the parties were given the opportunity to submit pertinent evidence, the Regional Director concluded that the Company's objections were without merit and recommended that they be overruled (R. 126-127). The Director's relevant findings are as follows:

1. In response to the Company's contention that "an insufficient number" of employees participated in that election (137 out of 506 eligible employees) (R. 109), the Director found that the time, place, and

hours of the second election were well publicized, and that the low turnout, which was not sufficiently low to invalidate the election, was primarily caused by the Company's own statements to the employees to boycott the election (R. 119-120).

2. Accepting as true the allegations made in affidavits (submitted by the Company) of two employees that one employee had strongly advocated participation in the election and another had made certain threats in connection with the election, the Regional Director found no evidence that the alleged threats were made by persons acting on behalf of the Union. He further found that the alleged threats were simply aimed at getting the employees to vote in the election, and not necessarily to vote for the Union and that, in these circumstances, they could not be deemed to have affected employee free choice (R. 122).

3. With respect to the Company's contention that seven voters in the second election were ineligible, the Director found that five were eligible and that the votes of the other two had not in fact been counted (R. 111-112, 122-123).

4. Finally, the Regional Director rejected the challenge of the election on the ground that it was held in a "public bar and dance hall at which site a Union rally and meeting was held the night before the election" (R. 110). Noting that an alternate location for the election was necessitated by the Company's failure to cooperate in the conduct of the second election (R. 114, 124), he found that the ballroom, located approximately one mile from the Company's plant,

was chosen after an "extensive investigation" showed it to be the most desirable and feasible place for the election. No alcoholic beverages were sold during the election in the ballroom, which had actually been closed to the public for several months prior to the election (R. 124). The Regional Director further found that, while the Union had held a meeting there the night before the election, the purpose of this meeting was simply to acquaint the employees with the location of the election (R. 124). Accordingly, the Director concluded that the use of the ballroom did not interfere with employee free choice in the election (R. 125).

The Company filed exceptions to the Regional Director's report with the Board (R. 128-133). Upon consideration of the entire record, the Board found that the Company's exceptions raised "no material or substantial issues of fact or law warranting reversal of the Regional Director's findings, conclusions and recommendations" and accordingly certified the Union as the bargaining representative of the Company's employees (R. 133-134).

Still of the view that the second election was invalid, the Company subsequently refused to bargain with the Union, leading to the issuance of an unfair labor practice complaint. After the Company filed its answer, the Board's General Counsel moved for summary judgment on the ground that the only issues raised by the Company had been decided in the underlying representation proceedings and should not be relitigated (R. 150). The Trial Examiner granted the motion and recommended that the Company be

ordered to bargain with the Union (R. 179-186), which recommendation the Board adopted (R. 190-191). The court of appeals sustained the Board's decision and enforced its order (Pet. App. A1-A12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with a decision of any other circuit. There is thus no warrant for further review.

1. Petitioner contends (Pet. 11) that the second election was invalid because only 27 percent of the eligible voters participated. Past precedents require no minimum percentage of participation, but hold that, if an election has been sufficiently publicized and the employees have been afforded full opportunity to vote, the majority of those who cast ballots decide the election, even though they may constitute a small proportion of the eligible voters. As stated in *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F.2d 474, 477 (C.A. 5), "voters who could have voted in a formal election but do not are considered to assent to the majority of those who do vote." See *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560; *National Labor Relations Board* v. *Deutsch Co.* (230 out of 460 eligible employees voted), 265 F.2d 473, 478-481 (C.A. 9), certiorari denied, 361 U.S. 963; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board* (56 out of 225 eligible employees voted), 114 F.2d 144 (C.A. 7); *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 149 F.2d 435, 436-439 (C.A. 4), certio-

rari denied, 326 U.S. 723; *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F.2d 852, 853-854 (C.A.D.C.), certiorari denied, 324 U.S. 847; *National Mineral Co.* (83 out of 453 employees voted), 39 NLRB 344, enforced, 134 F.2d 424 (C.A. 7), certiorari denied, 320 U.S. 753. As the court below correctly pointed out (Pet. App. A7), application of this principle is particularly appropriate here where it would obviously be inequitable to allow the Company to urge employees to boycott the election and then subsequently have the election invalidated on the basis of the small turnout.

2. Petitioner's contention that it was entitled to an evidentiary hearing at some point during the proceedings is premised on its view that its objections to the second election presented material issues of fact.[3] The Regional Director, however, accepted for the most part the Company's factual allegations but found that the conduct alleged was not sufficient to affect the results of the election. The allegation that two employees were coerced, for example, was accepted as true, but this conduct was found not to have had " 'a probable effect upon the employees' action at the polls' " (Pet. App. A10). The Company's allegations concerning the eligibility of certain voters and the appropriateness of the polling place raised no disputed factual issues. In these circumstances, no evidentiary hearing was required.

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[3] Section 102.69(c) (29 C.F.R. 102.69(c)) of the Board's Rules provides for an evidentiary hearing where objections present "substantial and material factual issues."